

NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA08-839

JAMES DALE ELLENBERG
APPELLANT

V.

BURNETT GIBBS MOTORS, INC.;
Risk Management Resources; Death &
Permanent Total Disability Trust Fund;
Second Injury Fund

APPELLEES

Opinion Delivered February 25, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F107697]

AFFIRMED

JOSEPHINE LINKER HART, Judge

On May 17, 2001, appellant, James Dale Ellenberg, suffered a compensable injury to his neck and back. Ellenberg's employer and its insurance carrier accepted a seventeen percent permanent physical impairment. Before the Arkansas Workers' Compensation Commission, Ellenberg unsuccessfully sought additional temporary total disability benefits and wage-loss or permanent total disability benefits. On appeal from that decision, he argues that there was not a substantial basis for the Commission's denial of benefits. We affirm.

Ellenberg was forty-five years old at the time of the hearing and had completed high school and approximately twenty hours of college credit. Further, he worked as a mechanic for twenty years and was employed with appellee Burnett Gibbs Motors, Inc., for twelve to thirteen years. At the time of his 2001 compensable injury, he was making around \$70,000 a year. When Ellenberg returned to work after a series of surgeries to his neck, he found his

salary reduced by fifteen percent, so he ceased employment there. According to Ellenberg's testimony at the hearing, he was told that his wages were reduced because business was not as good. In August 2002, he went to work for another employer, where he remained employed until February 2003. Ellenberg has not worked or sought employment since February 2003.

On July 16, 2004, he was found to be at maximum medical improvement, and on August 31, 2004, in addition to the permanent physical impairment of twelve percent for his neck injury assigned in 2002, he was assigned a five percent permanent physical impairment for his back injury. On January 18, 2005, Ellenberg underwent a functional capacity evaluation, which showed him able to work at light physical demand for an eight-hour day with some accommodations. On May 16, 2005, he began treatment with Dr. Thomas Ward for chronic pain management, who provided him with pain medication and injections to his back. On January 10, 2006, Dr. Ward opined that Ellenberg had reached maximum medical improvement and released him from further treatment other than maintaining his prescription medications.

On his own initiative, Ellenberg contacted Arkansas Rehabilitation Services in March 2005. Tests showed he had an above average capacity in reading comprehension and a high school level math and spelling rating. Arkansas Rehabilitation Services concluded that he would likely be successful in a traditional college format. He did not, however, sign up for classes in either August 2005 or January 2006. A vocational rehabilitation counselor who evaluated Ellenberg in 2006 concluded that Ellenberg should resume training with Arkansas

Rehabilitation Services. The counselor also conducted a transferrable skills analysis to determine what type of work he could do and what types of jobs might be available to him, and the counselor found jobs within his functional capacity.

In his first point on appeal, Ellenberg argues that there was not a substantial basis for the Commission's denial of additional temporary total disability benefits. To receive temporary total disability benefits, claimants must prove by a preponderance of the evidence that they were within a healing period and totally incapacitated from earning wages. *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, ___ S.W.3d ___ (2008). The "healing period" is the "period for healing of an injury resulting from an accident." Ark. Code Ann. § 11-9-102(12) (Supp. 2007). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Hickman, supra*.

In reviewing decisions from the Commission, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms if the decision is supported by substantial evidence. *Whitlatch v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the appellate court affirms if the Commission's opinion displays a substantial basis for the denial of relief. *Id.*

With regard to temporary total disability benefits, Ellenberg contends that he entered

a second healing period on May 16, 2005, the date he began receiving treatment from Dr. Ward, to January 10, 2006, the date Dr. Ward released him. His treatment by Dr. Ward, however, went only to alleviating his pain symptoms. The persistence of pain is not sufficient in itself to extend the healing period. *Bray v. Int'l Wire Group*, 95 Ark. App. 206, 235 S.W.3d 548 (2006). Further, there was evidence that in 2004 his healing period had ended and that he had received an impairment rating. Thus, there was a substantial basis for the denial of additional temporary total disability benefits.

The Commission also denied Ellenberg wage-loss or permanent total disability benefits, and for his second point on appeal Ellenberg asserts that there was not a substantial basis for the denial of benefits. The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Whitlatch, supra*. Our workers' compensation statutes provide that "[i]n considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002).

Ellenberg asserts that the evidence presented does not support the statutory bar to wage-loss benefits, as it was not shown that he was subsequently employed at weekly wages equal to or greater than his average weekly wage at the time of the accident. *See* Ark. Code Ann. § 11-9-522(b)(2) (Repl. 2002). Further, he asserts that the evidence presented does not

show that he was barred from obtaining wage-loss benefits for waiving rehabilitation or refusing to participate in or cooperate with either an offered program of rehabilitation or job placement assistance. *See* Ark. Code Ann. § 11-9-505(b)(3) (Repl. 2002). We do not, however, perceive the Commission's opinion as relying on either statutory bar. Nevertheless, despite the inapplicability of either statute, we cannot say that there was not a substantial basis for the denial of wage-loss or permanent total disability benefits.

As previously noted, in considering wage-loss benefits, the Commission may take into account the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. Ellenberg was forty-five years old at the time of the hearing, had the ability to work at light duty, had completed high school, and had earned some college credit. Furthermore, in considering factors that may affect a claimant's future earning capacity, the Commission may consider the claimant's motivation to return to work, because a lack of interest or a negative attitude impedes assessment of the claimant's loss of earning capacity. *Whitlatch, supra*. Here, there was evidence the Commission could consider on Ellenberg's motivation to return to work and his lack of interest or negative attitude that would impede assessment of his loss of earning capacity. In 2005, he was found capable of performing light-duty work. Despite this, he has remained unemployed and has not sought work since 2003, even though his healing period ended in 2004. And even though he was found capable of pursuing an education, he did not do so. Thus, we conclude that given his age, his education, his ability to work at light duty, and the impediments to the assessment of his loss of earning capacity, there was a substantial basis for the denial of benefits.

Affirmed.

GLOVER and HENRY, JJ., agree.